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IS IT TIME TO CHANGE THE ROCKEFELLER DRUG LAWS?

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I. INTRODUCTION

When the current New York State Penal Law¹ went into effect in 1965, the provisions dealing with drug offenses were brief and simple. The penalties for these crimes were moderate sentences, in keeping with the general philosophy that non-violent crimes should be treated less severely than those involving violent conduct.² In the late 1960's and early 1970's, however, as our cities became plagued by the scourge of drug abuse, the public clamored for answers to the problem. In New York State, Governor Rockefeller and the Legislature responded by enacting the toughest drug laws in the nation. Commonly known as the Rockefeller Drug Laws, these statutes³ provided for mandatory prison terms involving a

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1 See N.Y. PENAL LAW § 500.10 (McKinney 1993). Enacted in 1965, it went into effect in 1967. *Id.*

2 See Frederick M. Lawrence, *The Punishment of Hate: Toward A Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320, 352 (1994). The author advances a theory of punishment that would "compare the degrees of badness presupposed on the average by different offenses, and having done that, can lay down the principle that a lesser offense should not be punished so severely as a greater one." *Id.*; see also *People v. Letterlough*, 86 N.Y.2d 259, 265, n.2 (1995). The court noted that when the legislature enacted the New York Penal Law in 1965, it was likely influenced by the premise that individuals could be rehabilitated of their criminal tendencies and that the remedy of prohibition, intended for less serious offenses, was meant to bring about the rehabilitation. *Id.*

3 See Joseph W. Bellacosa, *Judging Cases v. Courting Public Opinion*, 65 FORDHAM L. REV. 2381, 2397 (1997) (referring to legislation launched in early 1970's, as "Rockefeller Drug Laws", as an executive solution which included sever restrictions on judicial discretion in sentencing); Paul J. Kellner, *Towards A Model Penal Code, Second (Federal?) The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297, 312 (1998) (indicating mandatory sentences of different levels attached to different degrees of crimes was embodied in

possible life imprisonment sentence for a large category of drug offenders.⁴ As a result, our prison population quickly swelled to new heights.⁵ Over the twenty-five years in which these sentences have been in effect, questions have been raised about their propriety and effectiveness and today a new debate is beginning as to whether it is time to repeal and drastically modify these sentences. Where we have been, where we are and where we might and should be going with respect to New York's drug laws is the subject of the instant article.

A. The Original 1965 Enactments

Under the penal law in effect in 1967, Article 220 divided drug offenses into two basic categories: possession and sale.⁶ Each category was then subdivided into degrees depending upon the nature and quantity of the drugs involved.⁷ Four categories were established for possession crimes⁸ and three categories were created for

New York's "Rockefeller Drug Laws"); Steven Wisotsky, *Exposing the War on Cocaine: The Futility and Destructiveness of Prohibition*, 1983 WIS. L. REV. 1305, 1415 (1983) (concluding that Governor Rockefeller's crusade against drugs reached its pinnacle when he convinced New York's legislature to adopt nations toughest drug law).

⁴ See Tracy Huling, *Women Drug Couriers: Sentencing Reform Needed for Prisoners of War*, 9 CRIM. JUST. 14, 17 (1994) (noting that Rockefeller Drug Laws contained most severe penalties for drug offenses in nation); see also Joseph A. Bellacosa, *Symbols, Slogans, and Cymbals of Criminal Justice: Where's the Substance?*, 36 CATH. LAW. 375, 383 (1996) (commenting how New York Court of Appeals ruling in *People v. Thompson* "re-trenched the primacy of the more than twenty year old Rockefeller Drug Law regimen- the sentence had to be fifteen years to life, no judicial exceptions nor discretion allowed"); Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & L. 1, 39 (1995) (concluding that principle purposes of 1973 drug law were to scare drug offenders with threat of "get-tough" laws).

⁵ See Spiros A. Tsimbinos, *After Jenna's Law, is it Time to modify the Rockefeller Drug Laws?*, N.Y. CRIM. L. NEWS, Sept.-Oct. 1998, at 8 (discussing circumstances around New York state's increase in prison population from 13,000 to 70,000 since laws were enacted, without controlling drug trade); see also Bellacosa, *supra* note 4, at 384 (indicating how numbers of inmates in New York prisons has catapulted from 12,000 to over 60,000 since adoption of Rockefeller Drug Laws).

⁶ See N.Y. PENAL LAW § 220 (McKinney 1967).

⁷ See *id.*

⁸ See N.Y. PENAL LAW § 220.05 (McKinney 1967) (creating fourth degree A-class misdemeanor for criminal knowing and unlawful possession of dangerous drug); N.Y. PENAL LAW § 220.10 (McKinney 1967) (creating 3rd degree E-class felony for criminal knowing and unlawful possession of dangerous drug with intent to sell); N.Y. PENAL LAW § 220.15 (McKinney 1967) (creating 2nd degree D-class felony for criminal knowing and unlawful possession of dangerous narcotic drug with intent to sell, or consisting of 25 or more cigarettes containing cannabis, or one or more preparations, compounds, mixtures or substances of aggregate weight of 1/8 ounce or more, containing any of the respective alkaloids or salts of heroin, morphine or cocaine, or 1/4 ounce or more, containing any cannabis, or 1/2 ounce or more, containing raw or prepared opium, or 1/2 ounce or more containing one or more than one of any of the narcotic drugs); N.Y. PENAL LAW § 220.20 (McKinney 1967) (creating 1st degree C-class felony for criminal possession of dangerous

sale.⁹ The sentence penalties ranged from fines or probation up to one year in jail for the least serious possession offense¹⁰ to a possible 5 to 15 years for the most serious possession offense.¹¹ The sale provisions ranged from a potential maximum of 2 1/3 to 7 for the least serious offense (Sale 3rd)¹² to 8 1/2 to 25 years for the most serious offenses (Sale 1st).¹³ From 1965 until 1969, the worst case scenario for the most serious drug dealer was 8 1/3 to 25 years. In addition, in 1966 the Narcotics Control Act¹⁴ recognized drug addiction as a disease and the addict as a sick person in need of treatment and established a comprehensive program of drug treatment facilities with the aim of rehabilitation rather than incarceration.¹⁵

II. THE ROCKEFELLER DRUG LAW AMENDMENTS

A. Possession

In 1969, however, the first of the Rockefeller-initiated changes

drug consisting of 100 or more cigarettes containing cannabis, or 1 or more preparations, compounds, mixtures or substances of aggregate weight of 1 or more ounces, containing any of respective alkaloids or salts of heroin, morphine or cocaine, or 1 or more ounces containing any cannabis, or 2 or more ounces containing raw or prepared opium, or 2 or more ounces, containing 1 or more than 1 of any of the other narcotic drugs).

⁹ See N.Y. PENAL LAW § 220.30 (McKinney 1967) (creating 3rd degree D-class felony for criminal knowing and unlawful sale of dangerous drug); N.Y. PENAL LAW § 220.35 (McKinney 1967) (creating 2nd degree C-class felony for criminal knowing and unlawful sale of dangerous narcotic drug); N.Y. PENAL LAW § 220.40 (McKinney 1967) (creating 1st degree B-class felony for criminal knowing and unlawful sale of dangerous drug to person less than 21 years old).

¹⁰ See N.Y. PENAL LAW §220.00 (McKinney 1967) (indicating required imprisonment for Class A misdemeanor violators).

¹¹ See N.Y. PENAL LAW §220.20 (McKinney 1967) (indicating required imprisonment for Class C felony violators).

¹² See N.Y. PENAL LAW §220.15 (McKinney 1967) (indicating required imprisonment for Class D felony violators).

¹³ See N.Y. PENAL LAW §220.40 (McKinney 1967) (indicating required imprisonment for Class A felony violators).

¹⁴ See N.Y. MENTAL HYGIENE LAW §§ 200.00 (McKinney 1967). The New York legislature stated that the purpose of this article was to provide a comprehensive program of human renewal of narcotic addicts in rehabilitation centers and aftercare programs. *Id.*

¹⁵ See *People v. Fuller*, 24 N.Y.2d 292, 301 (1969). The court indicated that the basic premise of New York's narcotic control program is a rehabilitative one. *Id.* The court further stated that the extended period of deprivation of liberty the statute mandates can only be justified as necessary to fulfill the purposes of the program. *Id.*; see also *People v. Bennet*, 39 A.D.2d 320, 322 (1972). The court stated that the New York legislature created the Narcotic Addiction Control Commission in 1966 and authorized it to "formulate a comprehensive plan for the long range development. . . of adequate services and facilities for the prevention and control of narcotic addiction, custody, treatment, aftercare and rehabilitation of narcotic addicts certified to the care and custody of the commission." *Id.*

("1969 Amendment") in the drug laws took effect.¹⁶ As of September 1, 1969, the number of drug offense categories for both possession and sale were increased and the penalties for the most serious offenses were greatly enhanced.¹⁷ The 1969 Amendments redesignated the original possession counts 4th, 3rd, 2nd and 1st degrees to 6th, 5th, 4th and 3rd degrees respectively and added two new categories.¹⁸

The two new categories, to wit, the new Possession 2nd and Possession 1st, dealt with aggregate weights of eight ounces or more or sixteen ounces or more of a substance containing drugs such as heroin, morphine, cocaine and opium.¹⁹ The penalties for the 2nd Degree-B felony of Possession were set at 8 1/3 to 25 years.²⁰ The penalty for 1st Degree-A felony Possession was set at 15 years to

¹⁶ See N.Y. PENAL LAW §§ 220.01-220.40 (McKinney 1969).

¹⁷ See N.Y. PENAL LAW §§ 220.22, 220.33, 220.44 (McKinney 1969) (outlining changes Rockefeller initiated that amended seven sections and added three new sections to Penal Law).

¹⁸ See N.Y. PENAL LAW §§ 220.22, 220.33 (McKinney 1969). Specifically, the 1969 amendments added the following categories:

Criminal Possession of a Dangerous Drug

§220.22 2nd Degree-B felony

A person is guilty of criminal possession of a dangerous drug in the second degree when he knowingly and unlawfully possesses a narcotic drug consisting of one or more preparations, compounds, mixtures or substances of an aggregate weight of eight ounces or more, containing any of the respective alkaloids or salts of heroin, morphine or cocaine, or containing raw or prepared opium

Id.

§220.23 1st Degree-A felony

A person is guilty of criminal possession of a dangerous drug in the first degree when he knowingly and unlawfully possesses a narcotic drug consisting of one or more preparations, compounds, mixtures or substances of an aggregate weight of sixteen ounces or more, containing any of the respective alkaloids or salts of heroin, morphine or cocaine, or containing raw or prepared opium

Id.

¹⁹ See *id.* (indicating both sections were classified under criminal possession of dangerous drug category).

²⁰ See N.Y. PENAL LAW §70.00(3)(a)(I) (McKinney 1995).

Minimum period of imprisonment. The minimum period of imprisonment under an indeterminate sentence shall be at least one year and shall be fixed as follows:

(a) In the case of a class A felony, the minimum period shall be fixed by the court and specified in the sentence.

(i) For a class A-I felony, such minimum period shall not be less than fifteen years nor more than twenty-five years; provided that where a sentence, other than a sentence of death or life imprisonment without parole, is imposed upon a defendant convicted of murder in the first degree as defined in section 125.27 of this chapter such minimum period shall be not less than twenty years nor more than twenty-five years.

(ii) For a class A-II felony, such minimum period shall not be less than three years nor more than eight years four months.

Id.

life.²¹ The 1969 Amendments marked the first time that a punishment for a drug crime in the state of New York carried the same penalty potential as a homicide.²²

B. Sale

The 1969 Amendment redesignated Sale 3rd, 2nd and 1st to 4th, 3rd and 2nd, respectively and created a new category of Sale 1st.²³ The new Sale 1st dealt with aggregate weights of sixteen ounces or more of such drugs.²⁴ The new 1st Degree Sale was also classified as an A felony, carrying corresponding life imprisonment provisions.²⁵ In addition, a new subdivision to the newly designated 2nd

²¹ See *id.*

²² See *People v. Molette*, 87 Misc.2d 236, 242 (N.Y. Sup. Ct. 1976). The court stated: In providing for such severe sentences for the violation of certain drug laws, the Legislature was not making a pronouncement that it considered drug law violations to be more serious than the taking of a human life. Rather, the Legislature was reacting to the unlawful widespread sale and distribution of drugs within this state which, if allowed to go unchecked and not severely punished, threatened to destroy the very fiber of our society. The sale of narcotics within this state or anywhere else, is not an isolated event. Rather, drug sales and usage is inseparably associated with other societal ills such as robbery, burglary, assault, and even homicide. It was to stem such a tide that the severe sentences were imposed. However, the fact that some drug offenses carry higher penalties than certain homicides cannot be interpreted to indicate that the [sic] former was, or is, considered by the Legislature of this state to be a more heinous crime than the latter. Another rational basis for the sole exclusion of certain homicides from the six-month ready rule of CPL Section 30.30 as compared to other crimes, drug related or otherwise, is the high degree of seriousness of a homicide, often attendant with complex trial preparation procedures.

Id.; see also *People v. Askew*, 403 N.Y.S.2d 959, 960-61 (N.Y. Sup. Ct. 1978). In reversing a life imprisonment sentence of a defendant convicted of possession of \$20 worth of cocaine, Justice Lowe of the Supreme Court Bronx County argued that the *Broadie* decision was no longer supported in light of new data proving that the imposition of life imprisonment resulted in higher, rather than lower minor possession convictions. *Id.* She agreed, however, with the *Broadie* court that, "drug offenses are punished more severely and inflexibly than almost any other offense in the State," with "murder in the First Degree authorizing capital punishment is the only crime punished more severely. Arson in the First Degree, Kidnapping in the First Degree and Murder in the Second Degree carry the same mandatory life sentences." *Id.*; *People v. Askew*, 66 A.D.2d 710, 713 (N.Y. App. Div. 1978) (Fein, J., concurring). This argument was accepted, cautiously on appeal. "In imposing sentence, it was clearly not within the province of the trial justice to refuse to follow or to overrule the holdings to the contrary by the Court of Appeals. Both the trial court and this court are duty bound to adhere to the determinations by the highest court of this State until overruled by that court." *Id.*

²³ See N.Y. PENAL LAW § 220.33 (McKinney 1969) (creating 1st degree felony for possession of sixteen ounces or more of unlawful substance); see also N.Y. PENAL LAW § 220.45 (McKinney 1969) (codifying 1969 amendment creating 1st degree A-class felony for criminal sale of dangerous drug when one knowingly and unlawfully sells narcotic drug consisting of 1 or more preparations, compounds, mixtures or substances of an aggregate weight of 16 ounces or more containing any of alkaloids of heroin, morphine or containing raw or prepared opium).

²⁴ See N.Y. PENAL LAW § 220.33 (McKinney 1969).

²⁵ See N.Y. PENAL LAW § 220.33 (McKinney 1969) (indicating criminal possession in

Degree Sale provision included the sale of aggregate weights of eight ounces or more of drugs such as heroin, morphine, cocaine or opium.²⁶

While both the Governor's 1969 Memorandum and the 1969 Amendments clearly distinguished between small scale sellers and large scale pushers,²⁷ the passage of the New York State Substance Control Act ("1973 Act") revisions in 1973,²⁸ constituting the core of the Rockefeller drug laws, essentially eliminated this distinction. As a result, the small scale pusher-addict was equated with the large scale pusher and consequently subjected to heightened penalties. The 1973 Act drastically revised the format of the drug laws by adding several new categories,²⁹ greatly enhancing sentencing penalties,³⁰ and making the imposition of enhanced sentences mandatory.³¹ The basic concept of the 1973 Act was to distinguish between degrees of possession and sale by weight of the prohibited substance.³² Under the 1969 Amendments only certain drugs such as heroin, morphine and cocaine were classified into degrees, which were differentiated by the quantity of the prepara-

first degree is class A felony).

²⁶ See N.Y. PENAL LAW § 220.22 (McKinney 1969); see also N.Y. PENAL LAW § 220.40 (McKinney 1969) (creating 2nd degree B-class felony for criminal sale of dangerous drug, knowingly and unlawfully, of aggregate weight of 8 ounces or more of . . . heroin, morphine or cocaine, or containing raw or prepared opium).

²⁷ See Governor Rockefeller's Memorandum on Approval of Bills, 1969 N.Y. Laws 787. The Governor stated:

The bills stiffen the penalties for pushers of hard-core narcotics-heroin morphine, cocaine or opium. . . The bills quite properly distinguish between small-scale sellers of hard-core narcotics who are often themselves addicted to the drugs they sell and large scale sellers who reap enormous weekly profits from plying their insidious trade. The severity of the increases in penalties that the bills provide is justified by the nature and the quantity of the drugs involved.

The alarming rise in the incidence of the use of narcotics, particularly among young people, and the resultant permanent damage to mind and body requires stern measures commensurate with the seriousness of the crime. It is well established that the distribution of narcotic drugs on a large scale basis is accomplished by means of an organized crime network.

We will all hope that the bills, by increasing substantially the criminal penalties for illegal sale and possession of dangerous drugs, may serve as an effective deterrent to the spread of the illicit drug trade.

Id.

²⁸ See 1972 N.Y. LAWS 878. The New York State Substance Control Act of 1973 amended New York's Public Health Law and Penal Law in relation to "controlled substances" and "dangerous drugs." *Id.*

²⁹ See *id.*

³⁰ See *id.*

³¹ See *id.*

³² See *id.*

tion, compound, mixture or substance containing the drug.³³ The unlawful possession of other contraband drugs, such as stimulants, depressants and hallucinogens, was denominated a class A misdemeanor regardless of the quantity involved.³⁴ The 1973 Act changed that by making the possession or sale of a specified amount of a broader variety of drugs a felony³⁵ and by formally substituting the term "dangerous drug" with "controlled substances."³⁶ Thus, three categories of drug possession and three categories of sale required mandatory imprisonment carrying minimum ranges of 1 to life (A-III), 6 to life (A-II) or 15 years to life (A-I). In 1973, the Legislature also established more severe penalties for second felony offenders and restricted plea bargaining options.³⁷ The 1973 enactments expressed the public and governmental frustration with the drug abuse problem, revealing an almost hysterical willingness to deal with it even if the toughest sanctions had to be imposed.³⁸

33 See N.Y. PENAL LAW § 220.22 (McKinney 1969) (creating criminal possession in second degree for possession of 8 ounces or more of dangerous drug); N.Y. PENAL LAW § 220.33 (McKinney 1969) (creating criminal possession in first degree for possession of 16 ounces or more).

34 See N.Y. PENAL LAW § 220.05 (McKinney 1969).

35 See generally ROSENBLATT, NEW YORK'S NEW DRUG LAWS AND SENTENCES STATUTES (1973).

36 See N.Y. PENAL LAW § 220.18 (McKinney 1973); see also N.Y. Penal Law §§ 220.03, 220.06, 220.09, 220.12, 220.16, 220.18, 220.21, 220.31, 220.34, 220.31, 220.39, 220.41, 220.43 (McKinney 1973) (codifying substitution of "dangerous drug" with "controlled substance").

37 See N.Y. PENAL LAW § 220.10(5) (McKinney 1969).

38 See N.Y. PENAL LAW § 220.10, Paul Hechtman, *Practice Commentaries*, at 7 (McKinney 1980). Mr. Hechtman observed the following regarding the 1973 amendments:

That revision 'mirrored many of society's concerns and attitudes about the problems inherent in and created by drug abuse. Frustration with the seeming intractability of the drug problem was reflected in the hard line approach to the classification of drug crimes and to tougher and more restrictive sentencing options upon conviction.'

Mr. Hechtman's Commentaries were based upon Governor Rockefeller's 1973 Executive Memorandum which in the strongest tones reflected the public's concerns as follows:

Virtually every poll of public concerns documents that the number one, growing concern of the American people is crime and drugs - coupled with an all-pervasive fear for the safety of their person and their property.

This reign of fear cannot be tolerated.

The law-abiding people of this State have the right to expect tougher and more effective action from their elected leaders to protect them from lawlessness and crime.

People are terrorized by the continued prevalence of narcotic addiction and the crime and human destruction it breeds.

People are outraged by the existence of corruption within the very law enforcement system itself.

People have lost patience with courts that dally and delay in bringing criminal

III. THE CONSTITUTIONAL CHALLENGE TO THE ROCKEFELLER DRUG LAWS: JUDICIAL ABDICATION

elements to justice.

People are often baffled and disheartened by revolving-door criminal justice and a correctional system that doesn't seem to correct.

I will now deal with each of these areas separately.

1. Narcotics

This is a time for brutal honesty regarding narcotics addiction.

In this State, we have tried every possible approach to stop addiction and save the addict through education and treatment-hoping that we could rid society of this disease and drastically reduce mugging on the streets and robbing in the homes.

We have allocated over \$1 billion to ever form of education against drugs and treatment of the addict through commitment, therapy, and rehabilitation.

But let's be frank - let's 'tell it like it is':

We have achieved very little permanent rehabilitation - and have found no cure.

a. For Effective Deterrence for the Pushing of Hard Drugs

Lots of wonderful young people have died - and hundreds of thousands more have been and are being crippled for life.

Addiction has kept on growing.

A rising percentage of our high school and college students, from every background and economic level, have become involved, whether as victims or pushers or both.

The crime, the muggings, the robberies, the murders associated with addiction continue to spread a reign of terror.

Whole neighborhoods have been as effectively destroyed by addicts as by an invading army.

We face the risk of undermining our will as a people - and the ultimate destruction of our society as a whole.

This has to stop.

This is going to stop.

Frankly, all the laws we now have on the books won't work to deter the pusher of drugs.

The police are frustrated by suspended sentences and plea bargaining in the courts for those they have arrested - and therefore are discouraged from effectively enforcing the law.

The prosecutors are overwhelmed by the backlog of cases and settle for pleas of guilty on reduced charges - rather than press for a conviction on more serious charges that would have a real deterrent effect - because the latter would result in long drawn-out jury trials.

And the judges, weighed down by calendars running months and years behind, hand out suspended sentences or go along with pleas of guilt or minor offenses that result in sentences of only six months to a year.

We have this choice:

-Either we can go on as we have been, with little real hope of changing the present trend;

-Or we must take those stern measures that, I have become convinced, common sense demands.

We must create an effective deterrent to the pushing of the broad spectrum of hard drugs.

In my opinion, society has no alternatives.

I therefore am proposing the following program for dealing with the illegal pushers of drugs including heroin, amphetamines, LSD, hashish and other dangerous drugs

Life Prison Sentences for All Pushers.

Id.

Almost immediately after the enactment of the 1973 Act, the sentencing provisions were challenged as being violative of the cruel and unusual punishment clause of the federal and state constitutions.³⁹ The New York Court of Appeals, however, unanimously held that the Rockefeller drug laws passed constitutional muster.⁴⁰ The court clearly framed the issue: Whether drug laws mandating life imprisonment and lifetime parole on parole release,

39 See *People v. Broadie*, 37 N.Y.2d 100, 110 (1975) (upholding constitutionality of life imprisonment for drug offenders); see also *Bellavia v. Fogg*, 613 F.2d 369, 374 (2d Cir. 1979) (affirming constitutionality of imposing life sentence upon defendants convicted of possession under 1975 amendments.); *People v. Thompson*, 83 N.Y.2d 477, 487-88 (1994) (affirming constitutional applicability of life imprisonment for 17 year-old's conviction for sale of 214 vials of cocaine for \$2,000, yet expressing doubts as to continued vitality of 'Rockefeller drug laws'); *People v. Donovan*, 59 N.Y.2d 834, 836 (1983) (affirming imposition of 15 year to life sentence for procuring drugs at request of defendant's boyfriend); *People v. Jones*, 39 N.Y.2d 694, 697 (1976) (per curiam) (upholding constitutionality of applying 15 year to life imprisonment sentence on defendant 'millhand' in drug manufacturing ring convicted of Class A-I criminal possession of a dangerous drug in the first degree despite others receiving lesser statutory sentences); *People v. Wanton*, 167 A.D.2d 202, 203 (A.D. 1990) (affirming concurrent terms of imprisonment of 15 years to life for criminal sale and possession of controlled substance in first degree and to three years for third-degree criminal possession of a controlled substance); *People v. Miranda*, 547 N.Y.S.2d 491, 492 (A.D. 1989) (affirming mandatory minimum 15 years to life for first degree sale and possession of a controlled substance where defendant willing sold ten ounces of cocaine, had previously sold the same amount and encouraged undercover officer who made the buy to cheat his backers); *People v. Buffa*, 139 A.D.2d 751, 752 (A.D. 1988) (affirming sentence of an indeterminate term of three years to life imprisonment, the minimum permissible term for a conviction of a class A- II felony offense); *People v. Buckmaster*, 139 A.D.2d 659, 659 (A.D.2d 1988) (affirming plea bargained sentence of 5 to life for criminal sale and criminal possession in first degree, of nine ounces of cocaine, class A-II felonies as not grossly disproportionately "violative of constitutional limitations"); *People v. Ortiz*, 64 N.Y.2d 997, 999 (1985) ("the mandatory sentences imposed upon defendant are not so grossly disproportionate to the offenses committed as to amount to an unconstitutionally cruel and unusual punishment"); *People v. Garcia*, 99 A.D.2d 738, 739 (A.D. 1984) (reversing class A-I felony sentencing for possession of one pound of cocaine with intent to distribute as inconsistent with N.Y. Penal Law §§70.00); *People v. Piccoli*, 62 A.D.2d 1078, 1078 (A.D. 1978) (affirming plea bargained sentences of six years to life on his plea of guilty of the crime of criminal possession of controlled substance in the second degree); *People v. Ward*, 57 A.D.2d 967, 967 (A.D. 1977) (rejecting appeal on grounds that "the mandatory sentence provisions of section 70.00 of the Penal Law constitute cruel and unusual punishment, and are greatly disproportionate to the offenses committed."); *People v. Portanova*, 56 A.D.2d 265, 276 (A.D. 1977) (affirming constitutionality of disparate sentences among co-defendants, where one was charged with class A-I felony and sentenced to mandatory minimum of 15 years to life and other plead down to criminal sale of controlled substance in the third degree, class A-III felony, who was sentenced by same judge to four years to life). Compare, *People v. Easton*, 629 N.Y.S. 2d 15, 216 (A.D. 1995) (reducing 15 year to life sentence to three years where criminal possession in first degree conviction was defendant's first offense and he supported a wife and three children); *People v. Isaacson*, 44 N.Y.2d 511, 525 (1978) (reversing on due process grounds a 15 year to life sentence on first time offender who was actively and insistently encouraged to sell narcotics by the police). See, e.g., *Carmona v. United States*, 576 F.2d 405, 417 (2d Cir. 1978) (holding that sentencing to life imprisonment under 1973 amendments of two defendants for sale of relatively small quantities of cocaine was constitutional per 8th amendment prohibition against cruel and unusual punishment where constitutional challenge was based on duration of sentence).

40 See *Broadie*, 37 N.Y.2d at 110.

prescribed sentences so disproportionate as to constitute cruel and unusual punishment.⁴¹ Recognizing that the new laws punished drug offenses more severely and inflexibly than almost any other offense in the state⁴² and that drug trafficking was punished more severely in New York than in other jurisdictions, the Court of Appeals reluctantly deferred to the Legislature's attempts to redress the epidemic drug problem threatening society.⁴³ The Court further concluded that the Legislature was within its discretion in acknowledging that sentences of life imprisonment sentences properly emphasized isolation and deterrence rather than rehabilitation.⁴⁴ Thus when faced with a serious drug epidemic,

41 See *id.* (questioning whether 'drug' laws constituted cruel and unusual punishment).

42 See *id.* at 115. The Court aptly pointed that only murder in the first degree carried a greater statutory penalty, capital punishment. *Id.* at 117. Moreover, arson in the first degree, kidnapping in the first degree, and murder in the second degree carry the same mandatory life terms. *Id.* Even a third-time felony offender will be subject to the same mandatory life sentence, under special circumstances *Id.* Among class A felonies, the narcotics offenses alone are not subject to plea negotiations. *Id.* at 115-16. Furthermore, among class A felony offenders, only those convicted of sale or possession of narcotics are barred from being completely discharged after five years of unrevoked parole. *Id.* Finally, more serious crimes such as manslaughter, kidnapping in the second degree, rape, robbery, and arson of an occupied building are ranked lower than the drug offenses as B felonies carrying a discretionary maximum sentence of 25 years and no minimum sentence. *Id.*

43 See *id.* at 113-17 (noting court does not concur nor necessarily agree with legislature's rationale for adopting imposed sanctions).

44 See *id.* at 110-15. The Court specifically observed:

The Legislature may distinguish among the ills of society which require a criminal sanction, and prescribe, as it reasonably views them, punishments appropriate to each. . .

In assessing the gravity of a criminal offense, the primary consideration is the harm it causes to society. The Legislature, in making this assessment, could properly view criminal narcotics sales not as a series of isolated transactions, but as symptoms of the widespread and pernicious phenomenon of drug distribution. Social harm in drug distribution is great indeed. The drug seller, at every level of distribution, is at the root of the pervasive cycle of destructive drug abuse.

Thus the Legislature could reasonably have found that drug trafficking is a generator of collateral crime, even violent crime. And violent crime is not, of course, the only destroyer of men and the social fabric. Drug addiction degrades and impoverishes those whom it enslaves. This debilitation of men, as well as the disruption of their families, the Legislature could also lay at the door of the drug traffickers.

Measured thus by the harm it inflicts upon the addict, and, through him, upon society as a whole, drug dealing in its present epidemic proportions is a grave offense of high rank.

The reasons for isolating drug traffickers have already been suggested. The Legislature could find that narcotics sellers were the crucial link in the pernicious cycle of drug abuse; that sellers spawn addiction, and that addicts, in turn, may become sellers. As a minimal proposition, the seller, in feeding the addict's habit, frustrates rehabilitation. The Legislature could conclude that the best way to break the chain would be to remove the seller from society for a long duration, and, upon his return, to continue surveillance through lifetime parole.

the Court of Appeals chose to allow the executive and legislative experiment to continue on.⁴⁵ Throughout the Court's decision, however, are serious doubts as to whether it would work.⁴⁶

IV. THE IMPACT OF THE ROCKEFELLER DRUG LAWS

By 1979, almost ten years after the enactment of the initial

Deterrence is the other obvious purpose. It was thought that rehabilitation efforts had failed; that the epidemic of drug abuse could be quelled only by the threat of inflexible, and therefore certain, exceptionally severe punishment.

Thus, to achieve the deterrence, so far seemingly elusive, the would-be drug trafficker had to be put on notice that, should he be caught, his fate was sealed regardless of his position in the hierarchy of distribution and regardless of the quantity of drugs in which he dealt.

Id.

⁴⁵ See *id.* at 110-18. The Court emphasized the reasonableness of legislative findings that drug trafficking is responsible for violent crimes and also dehabilitates those who it controls, thus leading to disruption in families. *Id.* As if to still hold the door open for future judicial intervention, Judge Breitel concluded his opinion by asserting "this is not to say that in some rare case on its particular facts it may not be found that the statutes are unconstitutional." *Id.*; *People v. Jones*, 39 N.Y.2d 694, 694 (1976). Almost prophetically in the following year, Judge Breitel, attempted to so hold, with respect to a fifteen year to life sentence imposed upon a drug middleman after trial where the leaders had received substantially lower sentences after plea agreements. Judge Breitel, however, found himself one of three dissenters with the majority of the Court upholding the sentence. In a vigorous opinion joined in by Judges Wachtler and Fuchsberg, Judge Breitel declared: "The mandatory sentence of life imprisonment, really lifetime parole, imposed in this case is unconscionable and barbaric because of the gross inequality of treatment of like persons involved in the identical crime. Since the earliest conscious evolution of justice in western society, the dominating principle has been that of equality of treatment of like persons similarly situated, a principle at the root of any rational system of justice." *Id.* at 698.

⁴⁶ See *Broadie*, 37 N.Y. 2d at 114-18. The court stated:

Defendants argue that the new sanctions neither favor, nor presume much likelihood of their future rehabilitation. True, the elimination of discretionary sentencing, and the substitution of inflexible maximum sentences have been often tried and as often abandoned as 'remedies'. Equally true, there is considerable highly-respected authority which questions the wisdom of eliminating flexible sentencing standards in drug cases in favor of long, mandatory prison terms.

The Court does not necessarily approve or concur in the Legislature's judgment in adopting these sanctions. Their pragmatic value might well be questioned, since more than a half century of increasingly severe sanctions has failed to stem, if indeed it has not caused, a parallel crescendo of drug abuse. The premises upon which the Legislature has proceeded have been subjected to vigorous dispute. Indeed, the debate moves beyond the wisdom of substituting long mandatory prison terms in place of flexible sentencing, of emphasizing isolation and deterrence over rehabilitation. Even the questions whether 'the policy of criminalization, which raises the cost and increases the difficulty of obtaining drugs, does in fact make the drug user a proselytizer of others in order that he may obtain funds to acquire his own drugs; and whether 'the compulsion of the addict to obtain drugs and the moneys to purchase them causes him to commit collateral crime that otherwise he might not commit', are questions about which reasonable men can and do differ. Given the present state of criminological knowledge, perhaps only time will tell whether the course pursued will prove effective or will fail as every similar effort since the Harrison Act of 1914 has failed.

Id.

Rockefeller drug initiatives, the New York State prison population had virtually doubled from approximately 12,000 in 1969 to 24,000 in 1979⁴⁷ and the percentage of incarcerated non-violent drug offenders increased from about ten percent in 1969 to over thirty percent in 1979. During the same time period, the crime rates continued to increase.⁴⁸

Beginning in the late 1970's, the Legislature realized that the more stringent drug laws had succeeded only in overcrowding New York prisons and failing to deter drug use or crime.⁴⁹ The Legislature, judicial system and successive Governors attempted to ameliorate the harsh effects of the sentencing laws.⁵⁰ What they failed to confront, however, was the more difficult question of whether those laws should ultimately be repealed. Unwilling to countenance political suicide, the different branches of government took modest steps to try to accomplish indirectly what they could not do directly.⁵¹ This piecemeal approach, however, has proven to be largely ineffective and often hypocritical, merely creating a pattern of half-hearted measures rather than a new procedural approach.

V. LEGISLATIVE, JUDICIAL AND EXECUTIVE ATTEMPTS AT AMELIORAZATION

With the passage of the Marijuana Reform Act⁵² in 1977, the Legislature excluded marijuana from the definition of crimes dealing with controlled substances⁵³ and created a separate law to deal with sale and possession of marijuana cases.⁵⁴ The new article was specifically enacted to reduce the penalties for possession and

⁴⁷ See Bellacosa, *supra* note 4, at 384 (noting New York State incarcerated 12,000 inmates between late 1920's until 1970's).

⁴⁸ See Rudolph J. Gerber, *Arizona Criminal Code Revision: Twenty Years Later*, 40 ARIZ. L. REV. 143, 168 (1998) (noting laws had no discernable effect on crime or drug use in New York).

⁴⁹ See William W. Schwarzer, Book Review, *Court Reform on Trial*, by Malcolm M. Feeley, 71 CALF. L. REV. 1572, 1576 (1983) (noting Rockefeller drug law prove to be ineffective imposing harsh sentences for marginal offenders, slight increase in punishment for major offenders and it was expensive to implement).

⁵⁰ See *People v. Thompson*, 190 A.D.2d 162, 170-71 (N.Y. 1994) (finding by appellate division that imposition of such harsh punishment violates constitution).

⁵¹ See *Thompson*, 190 A.D.2d at 167 (noting that Rockefeller drug laws failed to reach their objective).

⁵² See N.Y. PENAL LAW § 221 (McKinney 1998).

⁵³ See N.Y. PUB. HEALTH LAW § 3306 (McKinney 1998) (noting that Legislature did not, however, exclude concentrated cannabis from statute).

⁵⁴ See N.Y. PENAL LAW §§ 221.25, 221.30, 221.35, 221.40, 221.45, 221.50, 221.55 (McKinney 1998) (listing crimes defined as dealing with controlled substances).

sale of marijuana and to decriminalize the possession of a small amount for personal use.⁵⁵ The new marijuana penalties which remain in effect today set maximum penalties for marijuana offenses at fifteen days for a violation offense to fifteen years for a sale in the first degree.⁵⁶ The possibility of life imprisonment for marijuana offenses was therefore eliminated.

In 1979, the Legislature also enacted a series of amendments⁵⁷ to somewhat soften the harsh effects of the Article 220 drug laws.⁵⁸ The Legislature justified these amendments on the grounds that "the narcotics laws were overly harsh, often inequitable and were not conducive to efficient drug law enforcement."⁵⁹ These amendments affected three main areas: (1) increasing the amount or weight of the drug necessary to constitute the higher level felonies;⁶⁰ (2) the downward adjustment of the minimum sentence range for Class A-II convictions;⁶¹ and (3) the elimination of the Class A-III classification.⁶²

As to the weights, for the class A-I crimes, the threshold weight of the drug necessary to constitute the crime was doubled from one ounce to two ounces.⁶³ For the class A-II possession crime, the weight was also doubled and for the class A-II sale crime, the weight was quadrupled.⁶⁴ Former class A-III crimes were reclassified class B, and a new class B possession crime of between one-half and two ounces of a narcotic drug was introduced.⁶⁵ In the sentencing structure, the minimum period of imprisonment upon a class A-II conviction was lowered from six to three years. Finally, the 1973 law contained a retroactive resentencing section for those previously convicted of class A-II or A-III crimes which offered the

⁵⁵ See Legislative Findings and Statement of Purpose, 1977 N.Y. LAWS 360 (noting although legislature does not encourage or condone use of marijuana purpose of act is to ensure that persons who commit conduct that violate act are not subject to harsh penalties).

⁵⁶ See N.Y. PENAL LAW § 221.15 (McKinney 1998).

⁵⁷ See 1979 N.Y. LAWS 410 (amending Article 220 of New York's Penal Law to reduce severity of sentences).

⁵⁸ See *id.*

⁵⁹ See Hechtman, *supra* note 38, at 7.

⁶⁰ See *id.*

⁶¹ See *id.*

⁶² See *id.*

⁶³ See N.Y. PENAL LAW §220, Willaim C. Donnino, *Practice Commentaries*, at 7 (McKinney 1989).

⁶⁴ See *id.*

⁶⁵ See *id.*

possibility of lower sentences.⁶⁶

As a result of the ability to re-sentence certain drug offenders pursuant to the 1979 enactments, the courts proceeded to do so and several hundreds of drug offenders received reduced sentences. Further, appellate courts often opted to reduce sentences imposed for A felony drug offenses to the minimum possible rather than the higher ranges which may have been imposed by a trial court.⁶⁷

Further, in 1993 the New York Court of Appeals in *People v. Ryan*,⁶⁸ declared that where the definition of a crime required that the defendant "knowingly" possess or sell a controlled substance of a specified pure or aggregate weight, there must be proof that the defendant knew the weight of the substance as well as the nature of the substance.⁶⁹ For several years, this decision also enabled drug offenders to receive lower sentences.⁷⁰ As of June 10, 1995, however, the Legislature overruled *Ryan*.⁷¹ The Legislature made knowledge of the weight of the substance a strict liability element.⁷²

At the executive level, efforts to ameliorate the harshness of the drug laws have involved minor legislative initiatives,⁷³ a pardon or

66 See N.Y. PENAL LAW § 60.09 (McKinney 1989) (permitting re-sentencing of A-II and A-III offenses to reduce original sentence); N.Y. PENAL LAW §220, William C. Donnino, *Practice Commentaries* (McKinney 1989) (stating that A-II and A-III offenders could apply for re-sentencing).

67 See *People v. Shea*, 102 Misc.2d 901, 902 (Sup. Ct. 1980) (allowing re-sentencing of defendant sentenced to five year to life for criminal sale of controlled substance); *People v. Nathanson*, 102 Misc.2d 1022, 1023 (Sup. Ct. 1979) (re-sentencing defendant from one year to life to one to three years imprisonment).

68 82 N.Y.2d 497 (1993).

69 See *id.* at 499-504 (interpreting legislative intent to desire stronger punishment for those possessing larger quantities of controlled substances).

70 See *People v. Hill*, 85 N.Y.2d 256, 264 (1995) (vacating Appellate Division's affirmation and ordering new trial); see also *People v. Sanchez*, 86 N.Y.2d 27, 36 (1995) (denying defendant's motion to reduce charges since he should have "known" weight of drugs).

71 See N.Y. PENAL LAW §220 (McKinney 1989) (moving minimum weight requirement to follow, rather than precede, controlled substance throughout all sections).

72 See N.Y. PENAL LAW, §220, William C. Donnino, *Practice Commentaries* (McKinney 1989). While the Legislature did take certain steps in the late 1970s as indicated to eliminate the harshness of the drug laws in the area of PCP or angel dust, it felt it necessary to increase penalties for those crimes. *Id.* In 1978, 1979, and 1985 possession and sale crimes, with respect to PCP or angel dust (phencyclidine) were restructured. *Id.* The 1985 changes, which formed the current law, were based upon the recommendations of the NY State Committee on Sentencing Guidelines which indicated the need for increased penalties. *Id.* Thus, today, these penalties involved B-felony ranges carrying 25 year maximums. *Id.*

73 See N.Y. PENAL LAW, §220; Paul Hectman, *Practice Commentaries* (McKinney 1980).

clemency option,⁷⁴ and more recently early release programs.⁷⁵ These combined efforts have had only minimal success.⁷⁶ Over the 25 years in which the Rockefeller drug laws have been in effect, only about 100 drug offenders have received such pardons.⁷⁷ In 1995, Governor Pataki encouraged the creation of a deportation program allowing for the removal of several hundred drug offenders who were illegal aliens.⁷⁸ Although the program was initially publicized as applying to only low-level drug offenders, it was actually used to release several hundred drug offenders who were in the A-1 or A-2 categories.⁷⁹ Recent public criticism of this program has led to proposals to restrict its application to the originally intended low level offenders.⁸⁰ Further, through the Sentencing Reform Act of 1995,⁸¹ provisions were enacted for sentences of parole supervision for non-violent second felony drug offenders involving intensive rehabilitation programs as a substitute for long periods of incarceration.⁸² Retroactive parole release was also made available for certain inmates who were already serving class D or E drug offenses.⁸³ Through these actions, the Governor appears to be moving incrementally towards substantive changes in the Rockefeller drug laws.

VI. THE CONTINUING IMPACT OF THE ROCKEFELLER DRUG LAWS:

⁷⁴ See *A Good Deal for Criminal Justice*, N.Y. L.J., Mar. 20, 1997, at 2 (pardoning six defendants with fifteen to life sentences); Bruce Balestier, *Pardoned Artist-Inmate Begins Again as Paralegal*, N.Y.L.J., Oct. 14, 1997, at 1 (releasing prisoner early from fifteen to life sentence).

⁷⁵ See Paul S. Hechtman, *A Good Deal for Criminal Justice*, N.Y. L.J., Mar. 20, 1997, at 2 (indicating early release programs as way to ease drug laws).

⁷⁶ See Thomas Eddy, *Rockefeller Drug Law Critiqued by Inmate*, N.Y. L.J., Apr. 2, 1992, at 2 (indicating Rockefeller Drug Laws continue to be overly harsh).

⁷⁷ See Edward A. Adams, *Cuomo Faces Annual Ritual of Deciding on Clemency*, N.Y.L.J., Dec. 28, 1992, at 1 (showing former Governor Carey granted more clemencies than either Governor Cuomo or Governor Pataki); *Today's News Update*, N.Y.L.J., Dec. 26, 1997, at 1 (indicating Governor Pataki utilized his clemency option to grant pardons to three defendants convicted of A category drug offenses).

⁷⁸ See *Governor Moves to Eliminate Deportation Option for Serious Drug Dealers*, N.Y. CRIM. L. NEWS, May/June 1998, at 7 (discussing 1995 Sentencing Reform Act that allowed deportation of illegal alien drug offenders).

⁷⁹ See *Today's News Update*, N.Y.L.J., July 11, 1995, at 1 (stating proceedings started against illegal aliens convicted of drug offenses); see also Stanley Mailman, *Early Parole for Deportation and the Right to a Lawyer*, N.Y.L.J., Oct. 23, 1995, at 3 (discussing deportation of Columbian drug offenders).

⁸⁰ See Kevin Flynn, *Program Overhaul Eyed*, N.Y. DAILY NEWS, Mar. 22, 1998, at 6 (urging release of all but A-1 offenders).

⁸¹ See N.Y. CRIM. PROC. LAW § 410.91 (McKinney 1999).

⁸² See *id.*

⁸³ See *id.*

CALLS FOR REFORM

The legislative, judicial and executive efforts to ameliorate the harsh effects of the Rockefeller drug laws have only had a minimal impact. Thus, in 1998 the overall prison population in New York State jails stands at approximately 70,000, almost three times the prison population which existed in 1979.⁸⁴ Of that number, non-violent drug offenders comprise about 30% with their prison incarceration estimated to cost in the billions of dollars.⁸⁵

Judge Breitel, in *People v. Broadie*, stated that "only time will tell whether the course pursued will prove effective or fail."⁸⁶ After twenty-five years of dealing with the Rockefeller drug laws, it has become more and more apparent to all segments of the criminal justice system that they have had excessively harsh and devastating effects upon the lives of individual defendants while not accomplishing the desired goal of eliminating drug abuse. Consequently, the Governor and Legislature must heed the growing calls for reform. Significantly, the judiciary has expressed its keen interest in favor of reform. In *People v. Thompson*,⁸⁷ a case involving a fifteen-year to life sentence for a 17 year old female defendant, a majority of the Court of Appeals who voted to uphold the sentence, nonetheless, called for Legislative relief from the excessive sentence.⁸⁸ Moreover, Chief Judge Kaye herself recently broached the

⁸⁴ See Gary Spencer, *Effort Begun to Ease Rockefeller Drug Laws*, N.Y. L.J., May 7, 1998, at 1 (urging original authors of Rockefeller drug laws to provide judges with discretion).

⁸⁵ See William Sherman & Allen Salkin, *War Against Rampaging Parolees*, N.Y. POST, Mar. 22, 1998, at 7 (noting that average costs of prison incarceration for New York State prisoners estimated to be \$27,000.00 per year).

⁸⁶ 37 N.Y.2d 118 (1975).

⁸⁷ 83 N.Y.2d 477 (1994).

⁸⁸ See *id.* at 487.

That is not to say that we disagree with the strongly held convictions of our dissenting colleagues and of the majority at the Appellate Division in the instant case (190 AD2d, at 166-167) that the harsh mandatory treatment of drug offenders embodied in the 1973 legislation has failed to deter drug trafficking or control the epidemic of drug abuse in society, and has resulted in the incarceration of many offenders whose crimes arose out of their own addiction and for whom the cost of imprisonment would have been better spent on treatment and rehabilitation. The experience of the last two decades has clearly vindicated the doubts Chief Judge Breitel expressed in *People v. Broadie* on the wisdom of the draconian drug sentencing laws." Judges Bellacosa and Ciparick dissented and voted to uphold the sentence of eight years to life imposed by the trial court and affirmed by the Appellate Division on the ground that the rare *Broadie* exception applied to the facts of the case. Angela Thompson, the defendant in the case, was one of the defendants granted clemency by Governor Pataki in December of 1997 and even the trial judge, Juanita Bing Newton, wrote on her behalf in a case which "brought tears to her eyes."

issue of modifying the drug sentencing laws when she called for a commission to review "current procedures and to rethink our mandatory drug sentence laws as they apply to non-violent offenders."⁸⁹ In February of this year she offered two new additional proposals for modification of the mandatory drug sentences. In addition, a prominent citizen's group has called for modification and reform.⁹⁰

Id.; see also Raymond Hernandez, *Governor Commutes Sentences of Three Convicted on Drug Charges*, N.Y. TIMES, Dec. 25, 1997, at 4 (indicating lawmakers' believe that Rockefeller laws create severe penalties for low level offenses). See generally Gerald E. Lynch, *Towards a Model Penal Code, Second (Federal): The Challenge of the Special Part*, 2 BUFF. CRIM. REV. 297, 313 (1998) (explaining historic aspiration for penal codes not to contain many degree rankings or overlapping offenses).

⁸⁹ See Gary Spencer, *Kaye Urges Rewrite of Criminal Laws*, N.Y.L.J., Mar. 24, 1998, at 1 (stating that "[m]any of our sentencing laws, particularly our tough mandatory drug sentencing laws, apply to non-violent offenders have proven less than effective in achieving their objective and the cost has been very great").

⁹⁰ See Gary Spencer, *Effort Begun to Ease Rockefeller Drug Laws*, N.Y.L.J., May 7, 1998, at 1.

In a striking admission of fallibility, several leaders who played prominent roles in enacting and enforcing the Rockefeller drug laws yesterday called for reforms that would relax the strict mandatory minimum sentences for non-violent drug offenders.

The reform advocates include former Majority Leader Warren M. Anderson of Binghamton, who headed the State Senate when the laws were passed in 1973; former Senator H. Douglas Barclay of Syracuse, who sponsored the bill; and two former Court of Appeals judges, Richard D. Simons and Stewart F. Hancock, Jr., which Court struck down judicial efforts to provide some sentencing discretion to trial judges.

Richard J. Bartlett, who later became the state's first chief administrative judge, endorsed the mandatory sentencing scheme while serving as chairman of Governor Nelson A. Rockefeller's Crime Control Commission in 1973.

I thought it was right then, but I don't think history has proved me right," Mr. Bartless said at a press conference yesterday, observing that the state's prison population has grown from 13,000 to nearly 70,000 since the laws were enacted without controlling the drug trade.

They are members of the Campaign for Effective Criminal Justice, a group of political, judicial, religious and business figures organized by former State Senator John R. Dunne, who served as Assistant Attorney General for Civil Rights under President George Bush.

The group's goal is not to repeal the Rockefeller sentencing laws or the Second Felony Offender Law outright or even to decriminalize any current drug crime, Mr. Dunne said, but rather to give judges the discretion to sentence non-violent offenders to drug treatment and community service instead of to long mandatory prison terms.

Our sense of urgency arises from the fact that tens of thousands of low-level drug offenders have been sent to prison at great expense to the public and to little effect," he said, noting that more than 21,000 drug offenders are currently incarcerated under the Rockefeller and Second Felony Offender laws, roughly one-third of all inmates in the prison system.

Other members include Milton Mollen, former Deputy Mayor for Public Safety; former U.S. Attorney Whitney North Seymour; former Congressman Floyd Flake; and Bishop Howard Hubbard of the Roman Catholic Diocese of Albany.

The new group adds to a growing chorus of official voices calling for reexamination of the mandatory sentencing scheme, a chorus that includes prosecutors and some influential legislators.

VII. GOVERNOR PATAKI'S INITIATIVES AS OFFERING THE BEST POSSIBILITY FOR MAJOR REVISIONS

Just as it took Richard Nixon, a staunch anti-communist, to open the door to Red China and to gain acceptance for such actions, it may take Governor Pataki, a strong anti-crime advocate, to effectuate and obtain public acceptance for major changes in New York's tough drug laws. In many ways, as was already indicated, the Governor has already moved in this direction.

Governor Pataki's legislative initiatives to fight crime during the last three years appear to have as their focus, stricter penalties for violent crimes and repeat offenders while recognizing that providing prison space for these violent criminals may require more rehabilitation programs and shorter prison terms for the non-violent drug offender.⁹¹ Thus in the next few years, this dual focus of the Governor's criminal justice objective may create a more receptive atmosphere to the possibility of eliminating the severe mandatory lifetime sentences for certain categories of drug offenders.

A. Proposed Revisions

The Governor has correctly focused upon violent crime and repeat offenders as the main component of his legislative program. The successful enactment of the Sentencing Reform Act of 1995 and Jenna's Law⁹² greatly increased sentencing penalties for first time violent felony offenders and repeat violent felony offenders while at the same time, restricting sentencing and parole options. Since last year, nearly 22,000 of the State's 70,000 prisoners were incarcerated for non-violent drug crimes.⁹³ A logical proposal could

Id.

⁹¹ See Gary Spencer, *Assembly Compromise on Parole May Ease Rockefeller Drug Law*, N.Y. L.J., June 4, 1998, at 1 (indicating Assembly's criminal justice plan that toughens sentences for repeat offenders and diverts non-violent drug offenders to treatment programs).

⁹² See Bonnie Cohen-Gallet, *Jenna's Law Adds New Layer to Complex Sentencing Scheme*, N.Y. L.J., Aug. 20, 1998, at 1 (stating that even first-time offenders must serve finite sentence before they may be released from state incarceration).

⁹³ See Harvard Hollenberg, *Drug Laws Went Wrong Twentyfive Years Ago*, NAT'L L.J., June 1, 1998, at 21 (indicating that from 1973 to 1998 seventy thousand went to prison); *Drug Sentence Policy Opposed by Wardens*, N.Y.L.J., Dec. 22, 1994, at 2 (indicating that one hundred and fiftyseven wardens consider it wasteful to utilize prison space for mandatory minimum incarceration of nonviolent offenders); see also David C. Leven, *Curing America's Addiction to Prisons*, 20 FORDHAM URB. L.J. 641, 646 (1993) (examining that in New York's percentage of prisoners incarcerated for violent offenses is decreasing while percentage incarcerated for nonviolent drug offenses has increased fourfold).

be made to reduce the sentences for non-drug offenders including the elimination of the present life sentences⁹⁴ in order to provide the necessary jail space to accommodate the increased terms for violent felony offenders and possible increases in penalties for violent juvenile offenders. The revisions in the Rockefeller drug laws could be easily accomplished by returning to the original 1965 provisions which contained no life penalties for any of the drug offenses. The present drug laws could be restructured to reduce each current category beginning with Possession Fifth and Sale Fifth by one degree and consolidating the present A-II and A-I categories of sale and possession into a single B category. Thus, no A category containing life imprisonment options would exist and the top count for any drug offense would be a B felony carrying a maximum range of 25 years. My proposed restructured Article 220 would be as follows:

POSSESSION

§ 220.03 Criminal Possession in the Fifth Degree⁹⁵-A Misdemeanor

§ 220.06 Criminal Possession in the Fourth Degree⁹⁶-E Felony

§ 220.09 Criminal Possession in the Third Degree⁹⁷-D Felony

§ 220.16 Criminal Possession in the Second Degree⁹⁸-C Felony

⁹⁴ See *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991). The Court recognized the retroactive legislation as a method of reducing life sentences. *Id.* Just as in 1979, these reductions can also be made retroactive to persons previously sentenced.

⁹⁵ See Frank O. Bowman, *Playing "21" With Narcotics Enforcement: A Response to Professor Carrington*, 52 WASH. & LEE L. REV. 937, 937 (1995). The current seventh degree is simply changed to fifth degree without any further changes. *Id.*

⁹⁶ There is no present sixth degree and the current fifth degree would become fourth degree and the current D level would be reduced to an E Felony.

⁹⁷ The current fourth degree would become third degree and the C level would be reduced to a D Felony.

⁹⁸ The current third degree would become second degree and the B Felony would be reduced to a C level.

§ 220.18 Criminal Possession in the First Degree⁹⁹-B Felony*SALE*§ 220.31 Criminal Sale in the Fourth Degree¹⁰⁰-E Felony§ 220.34 Criminal Sale in the Third Degree¹⁰¹-D Felony§ 220.39 Criminal Sale in the Second Degree¹⁰²-C Felony§ 220.41 Criminal Sale in the First Degree¹⁰³-B Felony

We have been fortunate during the last few years that the crime rate in our state has dramatically decreased. The adoption of the proposed restructuring contained herein would not result in a return to lenient sentencing and a renewed increase in the commission of crimes because our current penal law, unlike the 1967 version, contains serious restrictions on plea bargaining and mandated increased penalties for violent felony offenders and repeat felony offenders. Thus, not only will serious drug offenders continue to face substantial penalties for their drug offenses, but if these offenses have resulted in violent criminal conduct or the drug offender has become a repeat offender, then the most serious possible penalties will become available for imposition. Thus, for example, if a drug offender is indicted for a Class B Possession or Sale offense, he would not be allowed to enter a guilty plea to less than a Class D Felony which carries a possible maximum sentence of seven years.¹⁰⁴ Further, if a drug offender has previously been con-

⁹⁹ The current first and second degrees would be combined into a new first degree and the current A-II and A-I Felonies would be replaced by a B Felony. The current Penal Law § 220.21 would thus be eliminated.

¹⁰⁰ The current fifth degree will become fourth degree and the D range will become an E Felony.

¹⁰¹ The current fourth degree will become third degree and the C range will drop to a D Felony.

¹⁰² The current third degree will become second degree and the B Felony will drop to a C range.

¹⁰³ The current second and first degrees would be combined into a single first degree with the A-II Felony and A-I Felony ranges being reduced to a B Felony. The current first degree § 220.43 would then be eliminated. If the need for compromise makes it impossible to remove all life terms, then I would retain it only for the current Sale First Degree under § 220.43 but would in any event reduce the minimum term from 15 years to 5 to at least allow for greater discretion by sentencing judges where such discretion would be warranted.

¹⁰⁴ See N.Y. CRIM. PRO. § 220.10 (5)(a)(iii) (McKinney 1998).

victed of a felony so as to qualify for Second Offender treatment, he would be subject to specified minimum and maximum sentences.¹⁰⁵

In addition, the ultimate sanction of life imprisonment would still remain a possibility if a drug offender has committed three or more felonies since he is subject to punishment as a persistent felony offender under section 70.10.¹⁰⁶ Although such a sentence is within the discretionary powers of the court, it may be imposed "when the court has found that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and lifetime supervision will best serve the public interest."¹⁰⁷

To further encourage the discretionary use of the life imprisonment option for a persistent felony offender when warranted the Legislature should reduce the current mandatory fifteen year minimum of such a sentence to a more reasonable lower level.¹⁰⁸

Both Governor Rockefeller and the court in *Broadie* focused on the relationship between drug use, violent crime and recidivism.¹⁰⁹

¹⁰⁵ See N.Y. PENAL LAW § 70.06 (3)(b) (McKinney 1998). Under § 220.10, a Class B Felony conviction carries a minimum sentence of 4 and 1/2 to 9 years with a maximum sentence of 12 and 1/2 to 25 years' imprisonment. A Class C Felony conviction carries a minimum sentence of 3 to 6 years with a maximum sentence of 7 and 1/2 to 15 years' imprisonment. A Class D Felony carries a minimum sentence of 2 to 4 years with a maximum sentence of 3 and 1/2 to 7 years' imprisonment. A sentence of parole supervision may be available for certain D and E Felonies pursuant to Penal Law § 70.06 (3) and CPL § 410.91 which were adopted as part of the 1995 Sentencing Reform Act. Under which a Class E Felony carries a minimum sentence of 1 and 1/2 to 3 years' with a maximum sentence of 2 to 4 years imprisonment.

¹⁰⁶ See N.Y. PENAL LAW § 70.10 (McKinney 1998).

¹⁰⁷ See N.Y. PENAL LAW § 70.10(2) (McKinney 1998).

¹⁰⁸ Interestingly and somewhat illogically, section 70.08, dealing with persistent violent felony offenders, offers a lower minimum range for Class D violent offenses than D offenders being sentenced under § 70.10. See *People v. Velez*, 163 Misc.2d 571, 575 (N.Y. Sup. Ct. 1994) (explaining that New York's Criminal Procedure Law section 70.10 gives courts discretion to sentence persistent felony offenders from fifteen year to life sentence if court feels it will serve public interest); Spiros A. Tsimbinos, *A Proposed Change in the Minimum Terms for Persistent Non-Violent Offenders*, 13 N.Y. CRIM. L. NEWS 4, 4 (1996) (calling for reform of section 70.10).

¹⁰⁹ See 1973 N.Y. LAWS 196. Governor Nelson A. Rockefeller stated in an Executive Memorandum that "[t]he crime, muggings, the robberies, the murders associated with addiction continue to spread a reign of terror." *Id.*; see also *People v. Broadie*, 37 N.Y.2d 100, 113 (1975):

Defendants would minimize drug trafficking by arguing that it is not a crime of violence. Because of their illegal occupation, however, drug traffickers do often commit crimes of violence against law enforcement officers and, because of the high stakes, engage in crimes of violence among themselves (citations omitted). . .

More significant, of course, are the crimes which drug traffickers engender in others. The seller often introduces the future addict to narcotics. The addict, to meet the seller's price, often turns to crime to "feed" his habit. Narcotics addicts not only

Under the proposed revisions, drug offenders will face serious consequences for drug fines. Further if their drug use or activities also lead to violent conduct or if they engage in repeated felony offenses they will be subject to the most serious consequences of lengthy mandatory prison terms including the possibility of life imprisonment. These sanctions, however, would be imposed for the offenders violent conduct or repeated conduct where the sentences would be clearly justified and not for mere drug possession or addiction where they are not.

If our focus today is on violent crime and recidivism, we can adequately deal with these concerns under current existing law by properly emphasizing sentence options of isolation and deterrence. There is no longer any need, however, to impose life sentences for pure drug crimes in the absence of violence or recidivism and to claim that this approach is justified as the only way to deal with the problem. The goal of rehabilitation must again be introduced as a viable objective of the sentencing process with respect to pure drug crimes.

CONCLUSION

After twenty-five years of operating under the Rockefeller drug laws, it is apparent that change and revision are necessary. Sometime within the next few years, under the administration of Governor Pataki, the best possibility may present itself for effectuating these changes. It is hoped that this article will stimulate a fuller debate on the issue and that it may offer some thoughts and suggestions which could form the basis for reasonable and meaningful reform. In this way, criminal conduct involving drug use can be dealt with firmly and effectively while still maintaining a proper sense of justice and fairness in the criminal justice system.

account for a sizable percentage of crimes against property; they commit a significant number of crimes of violence as well.

Faced with what it found to be a high recidivism rate in drug-related crimes, as inadequate response to less severe punishment, and an insidiously growing drug abuse problem, the Legislature could reasonably shift the emphasis to other penological purposes, namely, isolation and deterrence."

Id.